REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO:A5015/2022

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

_____ 15 November 2022
SIGNATURE **DATE**

In the matter between:

TUHF LIMITED	Appellant
and	
68 WOLMARANS STREET JOHANNESBURG (PTY)LTD	First Respondent
10 FIFE AVENUE BEREA (PTY) LTD	Second Respondent
MARK MORRIS FARBER	Third Respondent

JUDGMENT

MATOJANE J

Introduction

[1] This is an appeal against the whole of the judgment of the court *a quo* dismissing an application instituted by the appellant against the respondents in which the appellant sought to foreclose on a mortgage bond executed by the first respondent as security for its obligations to the appellant in terms of a loan agreement.

[2] The appellant brought an application against the first respondents in the court below seeking, amongst others, payment of the accelerated amount of money in the sum of R4 897 004.22 with interest. Foreclosure on a mortgage bond executed by the first respondent as security for its obligations to the appellant in terms of a loan agreement and cession of the rental amounts payable by the tenants at Wolbane Mansions and other relief.

[3] The central issues in the application before the court *a quo* and in this appeal is whether, despite the first respondent keeping up with its monthly instalments in terms of the Loan Agreement, the appellant was entitled to accelerate payment and claim the total outstanding indebtedness as a result of the first respondent's alleged breach of the Loan Agreement by not paying to the City of Johannesburg the debt that it disputes to the point of obtaining a court order compelling the COJ to debate its accounts with the first respondent.

[4] The court below held that:

"In my respectful view allowing the applicant to rely on non-payment of such services, electricity, rates and taxes as a ground to allege a breach of the loan agreement entitling it to the cancellation, accelerated payment, and cession of rental revenue generated by the first respondent would be prejudicial to the first respondent. To allow the applicant to take such draconian steps when the first respondent is, in fact, up to date with the monthly payments will be an injustice of great proportion."

Background

[5] On or about 23 August 2013, the appellant entered into a Loan Agreement with the first respondent. The first respondent ("the Borrower") agreed to borrow an amount

of R5 771,166.00 ("the loan amount") from the appellant. The funds were to be used to assist the first respondent in the purchase and refurbishment of Wolbane Mansion, a large multi-unit residential property comprising over 51 residential units. The second and third respondents are sureties for and co-principal debtors, with the first respondent for its indebtedness to the appellant under the Loan Agreement.

[6] The security in the form of a mortgage bond was registered over the property in favour of the appellant for a total amount of R8 656,749.00 to secure the appellant's interests over the amount loaned.

[7] The Loan Agreement ("the Agreement") contained various clauses on the part of the Borrower, the breach of which would constitute an "Event of Default" entitling the appellant to declare the entire principal amount outstanding and all other obligations immediately due and payable.

[8] Below are several provisions from the Loan Agreement pertinent to the issues before us. Clause 17 of the agreement state that the first respondent was required to:

> 17.1 pay promptly on the due date for payment all rates, taxes, water and electricity charges (whether levied as basic charges or in respect of actual consumption), sanitation charges (in respect of refuse removal and sewerage) and other like imposts that may be payable in respect of the Property to any governmental, provisional, divisional council, municipal or other like authority;
>
> 17.2 provide proof of the aforesaid payments to the Lender whenever requested to do so, and the Lender has the right, but not the obligation, to make all such payments on behalf of the Borrower and any money so disbursed shall be immediately refundable by the Borrower to the Lender; and
>
> 17.3 provide to the Lender on a monthly basis certified copies of all statements for the amounts payable in terms of 17.1.

[8] The Loan Agreement defined the term "an Event of Default" and reads :

> Each of the following events shall constitute an Event of Default under the Loan Facility
>
> 18.1.1 the Borrower fails to pay any amount due by it in terms of this Loan Agreement on the due date for payment thereof or breaches any provision of this Loan Agreement and fails to remedy such breach within any applicable cure period;
>
> …

> 18.1.20 the Borrower fails to comply with all and any municipal bylaws.

[9] Clause 18.2 deals with the Lender's entitlement to accelerate and declare all amounts owing. It reads:

> Forthwith upon the occurrence of an Event of Default and at any time thereafter, if such event continues, the Lender shall in its sole and absolute discretion be entitled (but not obliged), without prejudice to any other rights which the Lender may have, by a notice issued by the Lender to the Borrower to –
>
> 18.2.3 accelerate and declare all amounts owing in terms of this **Loan Agreement** immediately due and payable, notwithstanding that such amounts may not otherwise have been due and payable, whereupon the same shall become immediately due and payable, including any fees, penalties, costs and charges...

[10] As it happened, the first respondent, while complying with its minimum monthly instalment obligation under the Loan Agreement, has not paid the CoJ rates, taxes, and municipal service charges since 30 October 2015 despite its tenants consuming the services every month to date. The first respondent has also failed to provide the appellant with proof of payment of municipal services as required in terms of the Agreement.

[11] On or about 20 December 2019, the appellant delivered a letter of demand to the respondent's attorneys notifying the first respondent that it was in breach of the Loan Agreement by failing to pay the sum of R3 288 156.08 to the COJ being the amount reflected as owing to the COJ in its statement of Account for November 2019. The first respondent was notified that this constituted an Event of Default. The first respondent did not adhere to the letter of demand and the appellant elected to accelerate and declare all amounts owing in terms of the Loan Agreement on 7 February 2020 in the sum of R4 974 739.90.

The issues

[12] The crux of the appellant's case is set out in paragraph 52 of the founding affidavit as follows:

> "The first respondent is the holder of the Account with the account number 552995492 with the COJ. The first respondent has failed to pay promptly its municipal service charges (rates, water and sanitation, refuse and electricity) in respect of the immovable Property,

> and it has consequently fallen into significant municipal arrears. In particular, it is evident from the COJ tax invoices for the immovable Property that as of 12 November 2019, the municipal Account in respect of rates, electricity, water and sanitation and refuse were in areas in the amount of R3 288.156.08 (Three Million Two Hundred and Eighty-Eighty Thousand One Hundred and Fifty-Six Rand and Eight cents".

[13] The first respondent submitted that it did not breach the Agreement by not paying the CoJ the entire disputed debt because clause 17.1 of the Agreement provides that failure to pay those amounts that may be payable to the CoJ will amount to a breach of the Agreement. The first respondent argues that no such amounts were payable at the time that the appellant placed it on terms to remedy its alleged breach of the Agreement.

[14] The first respondent states that since acquiring ownership of Wolbane Mansions on or about 6 March 2014, charges for electricity consumed at the Property were debited to the Account using incorrect readings of a different electricity meter which was not installed on the Property.

[15] When the CoJ disconnected the electricity supply to Wolbane Mansions in or around April 2016, the first respondent obtained a Court Order on 5 May 2016 in terms of which the CoJ was ordered, *inter alia,* to provide the first respondent with a statement and debatement of Account with the CoJ, credit the first respondent's Account with charges incorrectly levied. The CoJ was interdicted from unlawfully disconnecting the water and electricity supply to Wolbane Mansions.

[16] It bears mentioning that the order concerns a billing query relating to water and electricity supplied to the Property and not, for instance, rates, taxes and other municipal services.

[17] From this, two issues arise for determination. The first is whether the first respondent breached the loan agreement as alleged by the appellant and, if so, whether the appellant should be permitted to demand that the first respondent pay the entire disputed debt to the City of Johannesburg prior to such dispute being resolved with the CoJ.

[18] Before turning to these issues, it is necessary to decide first whether the first respondent was in breach of its obligations under the Loan Agreement at the time the

letter of demand was delivered. The first respondent contends that no amounts were payable to the COJ at the time.

[19] Section 96(a) of the Local Government: Municipal Systems Act, No. 32 of 2000 (hereinafter referred to as the "Systems Act"), obliges the City of Johannesburg (hereinafter referred to as "the CoJ") to collect all money that is due and payable to it, subject to the provisions of that Act and any other applicable legislation;

[20] In terms of section 4(1)(c) of the Systems Act, the Council may, *among other things*, levy rates on Property to finance the operational expenditure of the Council.

[21] Section 96(b) of the Systems Act requires the City to adopt, maintain and implement a credit control and debt collection policy, which is consistent with its rates and tariff policies and complies with the provisions of the Act; Clause 3 of the CoJ Property Rates Policy 2022/2023 provides that rates which are recovered by the Council on an annual or a monthly basis, are payable in full on or before the due date stipulated in the Account sent to the ratepayer.

[22] "Municipal Services" for purposes of the policy, is defined to mean services provided by the City, which include refuse removal, water supply, removal and purification of sewerage, sanitation, electricity services and rates either collectively or singularly, and any other miscellaneous services whether provided by the City or a Municipal Service Provider.

[23] The first respondent admits that since 6 March 2014, charges for electricity, water and refuse services consumed at Wolbane Mansions have been debited to an account that it alleges had an incorrect meter number. Electricity and water continue to be supplied and consumed at the Property. Since that date, rates were also levied in respect of the property and save for payment of R25 000.00 on October 2015 for electricity consumed at the property. No other payment for electricity, water consumed, or rates and taxes were paid. The last payment was made subsequent to the billing query the first respondent raised with the COJ.

[24] According to the remittance advice from the COJ dated 12 November 2019, which was attached to the letter of demand, the total rates and taxes levied were R5 333,90. The electricity amount due was R47 082.00. Water and sanitation were R60 272.48, and waste management service was not billed.

[25] The first respondent states that it was advised by its forensic specialist not to make a payment towards property rates and taxes as well as waste management services as such payment would deprive it of the defence of prescription. This reason for failure to pay for municipal services is flawed as the property rate is a debt in respect of taxation in section 11 of the Prescription Act, 68 of 1969, and the Council can recover rates in arrears for a period of up to 30 years[1].

[26] The First respondent's forensic specialist, Hugo Venter ("Venter"), advised the first respondent that assessment rates were billed to the Property and that the value was subject to the valuation objection[2]. Venter agreed with the amounts debited on the Account for sewer availability. Venter advised the first respondent that it was billed for water on estimated readings. Rates are levied in accordance with the Act as an amount in the Rand based on the market value of all rateable property as reflected in the valuation roll and any supplementary valuation roll, as contemplated in Chapters 6 and 8, respectively, of the Act.

[27] Despite knowledge of monies owed to the CoJ as advised by its specialist, the first respondent elected not to pay the undisputed rates, taxes, and water charges levied before the alleged billing dispute arose and after. It fails to pay the current monthly water consumed at the Wolbane Mansion.

[28] The first respondent does not dispute that waste management services in respect of Wolbane Mansions were received even though not billed for. In terms of the CoJ rates policy, a ratepayer remains liable for the payment of the rates whether or not an account has been received. If an account has not been received, the onus is on the ratepayer concerned to establish the amount due for the rates and to pay that amount to the Council. The first respondent is not absolved of paying for waste

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1 Section D of City of Johannesburg Property Rates Policy 2022/2023

2 Rates are levied in accordance with the Act as an amount in the Rand based on the market value of all rateable property as reflected in the valuation roll and any supplementary valuation roll, as contemplated in Chapters 6 and 8, respectively, of the Act.

management services which have been rendered to the property even though not billed for.

[29] In paragraph 62 of the answering affidavit, the first respondent tenders payment to the COJ once issues regarding the municipal charges have been resolved. The tender contravenes the CoJ's debt collection bylaws as municipal charges are payable in full on or before the due date stipulated in the Account sent to the ratepayer.

[30] The tender also contravenes clauses 17 and 18.1.20 of the Loan Agreement and clause 3 of the mortgage bond, which records that the first respondent was required to promptly pay all rates, taxes, water, electricity charges, sanitation charges and other like imposts that may be payable to the municipality.

[31] There is, therefore, no merit in the submission that there were no amounts due to the CoJ at the time a letter of demand was delivered. The first respondent's expert has confirmed what was due and payable by the first respondent to the CoJ. The first respondent not only breached the Loan Agreement by non-payment of municipal services, it also breached its obligations to the CoJ, which constitutes an event of default in clause 18.1.1 of the Loan Agreement. This event of default entitles the appellant to exercise its rights under the Loan Agreement and to accelerate payment thereunder.

[32] The other reason advanced by the first respondent for not complying with the Loan Agreement is the contention that the amount claimed by the CoJ is disputed. The first respondent argues that the statement and debatement of Account still have to take place in the future and that it is only after the CoJ has credited the incorrect debits to its Account that the first respondent will be in a position to tender payment in respect of the undisputed portion thereof.

[33] Once a dispute has been lodged regarding a particular disputed amount, the CoJ is obliged to separate such amount from payments made after the dispute has been lodged. Debt collection and credit control measures could not be implemented in regard to such disputed amount, but the obligation to pay rates and municipal service charges rendered in respect of any subsequent period on or before the due date specified in such subsequent account is not suspended. The customer must pay

the full amount of any account that relates to amounts for rates or municipal services which are not in dispute.

[34] In terms of section 102(2) of the Systems Act:-

> "(1) A municipality may-
> (a) consolidate any separate accounts of persons liable for payments to the municipality;
> *(b)* credit payment by such a person against any account of that person; and (c) implement any of the debt collection and credit control measures provided for *in* this Chapter in relation to any arrears on any of the accounts of such a person.
>
> (2) Subsection (1) does not apply where there is a dispute between the municipality and a person referred to in that subsection concerning any specific amount claimed by the municipality from that person.

[35] In Body Corporate Croftdene Mall v Ethekwini Municipality,[3] the Supreme Court of Appeal held that:-

> "It is, in my view, of importance that subsec 102(2) of the Systems Act requires that the dispute must relate to a 'specific amount' claimed by the municipality. Quite obviously, its objective must be to prevent a ratepayer from delaying payment of an account by raising a dispute in general terms. The ratepayer is required to furnish facts that would adequately enable the municipality to ascertain or identify the disputed item or items and the basis for the ratepayer's objection thereto. If an item is properly identified and a dispute properly raised, debt collection and credit control measures could not be implemented in regard to that item because of the provisions of the subsection. But the measures could be implemented in regard to the balance in arrears; and they could be implemented in respect of the entire amount if an item is not properly identified and a dispute in relation thereto is not properly raised.

[36] In the current matter, the dispute does not relate to a specific amount claimed by the municipality. The monthly water consumption at Wolbane Mansion cannot be disputed, as the first respondent's specialists confirmed it. Rates and takes are capable of easy calculation and cannot be denied. In breach of the Systems Act and the CoJ's Debt Collection By-Laws, municipal services have been consumed continuously without payment since 30 October 2015. This event of default constituted a breach of the Loan Agreement allowing the appellant to exercise its rights under the Loan Agreement and to accelerate payment thereunder.

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[3] 2012 (4) SA 169 at [22]

[37] The first respondent submits that it is patently unconscionable to allow the appellant to accelerate the first respondent's indebtedness in terms of the Agreement and to foreclose on the Property in circumstances where the first respondent is up to date with its minimum monthly instalments under the Agreement and the CoJ has not asserted any right to payment of the disputed Account and where there is no threat of doing so until the court-ordered statement and debatement process has been completed.

[38] Generally, contracting parties have considerable freedom in choosing how they structure their agreements, and it is not the function of the court to protect consenting adults from bad bargains. Legal certainty and the notion of *pacta sunt servanta* are central values of the law of contract, which must be honoured and enforced by the courts.

[39] The parties in the present matter enjoyed equal bargaining power when they negotiated the terms of the Agreement. There is no suggestion that the freedom to contract was undermined, the contract was freely entered into, and the parties did not make provision for withholding payments of municipal services where the charges are disputed.

[40] In Beadica,[4] the Constitutional court, in the majority judgment held that a court may not refuse to enforce a contractual term on the basis that the enforcement would, in its subjective view, be unfair, unreasonable or unduly harsh in the circumstances. The court explained that abstract values of fairness and reasonableness had not been accorded self-standing status as requirements for the validity of a contract. Instead, they are important considerations that a court will consider in determining whether the enforcement of a contractual term is contrary to public policy.

[41] The first respondent has failed to adequately explain why it has not paid its undisputed indebtedness to the CoJ on the due date. The harsh consequences of its failure to comply with the terms of the Agreement could not by itself constitute a sufficient basis for the conclusion that enforcement of the strict terms of the contract would be unconscionable. The first respondent freely agreed that the appellant is

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[4] Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others [2020] ZACC 13; 2020 (5) SA 247 (CC); 2020 (9) BCLR 1098 (CC) (17 June 2020).

entitled to accelerate payment and claim full outstanding indebtedness should it breach the Loan Agreement. The non-payment of the municipal services constitutes a breach of the Loan Agreement and a breach of the first respondent's obligation to the CoJ and constitutes an event of default in terms of the provisions of the Loan Agreement.

[42] The failure by the first respondent to perform its contractual obligation has destroyed the commercial purpose of the contract as the significant municipal arrears impair the appellant's security it required in order to advance the loan facility as a charge in favour of the municipality imposed by section 118(3)[5] of the Systems Act enjoys preference over any mortgage bond registered against the applicable immovable property[6].

[45] In the result, the following order is made.

1. The appeal is upheld with costs on the attorney and client scale, including the costs of two counsels:
2. The Order of the Court *a quo* is substituted with the following order:

2.1. 68 Wolmarans Street Johannesburg (Pty) Ltd, 10 Fife Avenue Berea (Pty) Ltd and Mark Morris Farber ("the respondênts") pay, jointly and severally, the one paying the others to be absolved, the sum of R4,897,004.22 with interest calculated at the rate of 2.50% above the commercial banks' prime rate plus 1 % per year, calculated daily and

2.2. TUHF Limited ("the applicant") is, with immediate effect, authorized to take cession of any rental amounts payable by the Wolbane Mansions tenants to 68 Wolmarans Street Johannesburg (Pty) Ltd ("the first respondent"); alternatively, the respondents, further alternatively its duly authorized agent, until payment in 1 above, as well as all outstanding municipal charges, and

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[5] An amount due for municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties is a charge upon the property in connection with which the amount is owing and enjoys preference over any mortgage bond registered against the property.

[6] BOE bank Ltd v Tshwane Metropolitan Municipality 2005 (4) SA 336 SCA

other like imposts that may be payable in respect of the immovable property at 68 Wolmarans Street, Hillbrow, are paid in full ("the cession");

2.3. The respondent sign all documents necessary to facilitate the cession in 2 above, failing which the Sheriff is authorized to sign all documents required to give effect to the cession:

2.4 The respondents furnish the applicant, within 15 days of this order, with the names and contact information of every tenant occupying the Wolbane Mansions ("the Wolbane Mansions tenants") together with:

2.4.1 copies of any written lease agreements concluded between the first respondent. Alternatively, the respondents, further alternatively its duly authorized agent, and the Wolbane Mansions tenants

2.4.2 Particularity and copies of any existing property management mandates with the Wolbane Mansions tenants; and

2.4.3 Particularity in respect of the terms of any implied end or oral terms of any lease agreement concluded with the Wolbane Mansions

3. the applicant may take steps necessary for purposes of collecting rental amounts from the Wolbane Mansions tenants:

4. the immovable property situated at

ERF 2154 JOHANNESBURG TOWNSHIP
REGISTRATION DIVISION I.R., THE PROVINCE OF GAUTENG, MEASURING 467 (FOUR HUNDRED AND SIXTY-SEVEN) SQUARE METRES
HELD By Deed of Transfer Number T7596/2014 (hereinafter referred to as the "immovable property") be declared executable, and the applicant is authorized to issue Writs of

Attachment calling upon the Sheriff of the Court to attach the immovable property to sell the immovable property in execution;

5. The respondents are to pay a penalty fee equal to 5% plus VAT of the monthly outstanding instalment amount from the due date for payment until the date of actual payment in full as of 10 February 2020

PP

KE MATOJANE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

PP_____

E MOLAHLEHI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

PP_____

R STRYDOM
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Heard: 17 August 2022
Judgment: 15 November 2022

For the Applicant:
Advocate AC Botha SC
Advocate E Eksteen
Instructed by Schindlers Attorneys

For the 1st to 3rd Respondents:
Advocate M De Oliveira
Instructed by Swartz Weil Van der Merwe Greenberg Attorneys